No. 02-1617

IN THE

Supreme Court of the United States

PHILLIS ROBINSON BRANCH,

Petitioner,

v.

SONY MUSIC ENTERTAINMENT, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Sony Music Entertainment, Inc, has a corporate parent, Sony Corporation, the shares of which are only traded in the United States through American Depository Receipts listed on the New York Stock Exchange, and no publicly held company owns 10% or more of its stock.

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REASONS FOR DENYING THE WRIT

The question presented by Petitioner is whether the Second Circuit's ruling in this case comports with the respective burdens of proof under this Court's well-established standards for the evaluation of the *prima facie* case in an employment discrimination case.

Respondent submits that the Second Circuit's ruling is consistent with this Court's standards, illuminates no glaring split among the circuits, raises no novel issues of law and is proper in all respects. Respondent respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari.

THERE IS NO SERIOUS DIVISION AMONG THE CIRCUITS REQUIRING THIS COURT'S REVIEW

I.

THE TRIAL COURT'S EXAMINATION OF PETITIONER'S PROFFERED *PRIMA FACIE* CASE

For purposes of evaluating whether summary judgment was appropriate the trial court chose both to "resolve the conflicts [regarding plaintiff's work performance] in favor of plaintiff" [ ] for the purpose of . . . [the] motion that [plaintiff's allegations of discriminatory conduct on the job] . . . [were] enough to raise an inference of discrimination under the *de minimis* standard applied in discrimination cases." (Petition, Appendix B, 9a) Having done so, and consistent with this Court's burden shifting analysis, the district court examined whether the employer had produced evidence that plaintiff was terminated for a legitimate, non-discriminatory reason. *Texas Dept. of Cmty. Affairs v.*

Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981). The district court determined that the employer had done so and consequently that the burden shifted to Petitioner to show that her employer's stated reasons for laying her off were pretextual. (Petition, Appendix B, 11a)

The trial court held that Petitioner had not demonstrated that the employer's stated reasons for laying her off were in any wise pretextual. (Petition, Appendix B, 11a) Parenthetically, the court noted that "much of plaintiff's argument that she was discriminated against is based on her allegations . . . that she was treated differently from other employees. . . ." (Petition, Appendix B, 11a-12a)

II.

PETITIONER'S ERRONEOUS ASSERTION THAT THERE IS A "FISSURE" AMONG THE CIRCUITS REQUIRING THIS COURT'S REVIEW AND HARMONIZATION

Petitioner asserts that there is a "significant fissure" among the circuits "in this and other cases addressing the issue of when a Plaintiff in employment discrimination [case] is similarly situated to other employees, for the purpose of showing discrimination under the McDonnell Douglas framework. . . ." as well as a "lack of harmony among the lower courts" on the ancillary issue of "whether a Plaintiff should be required to establish this [comparability] as part of the *prima facie* case, or at the stage of showing that the employer's assertions of non-discriminatory reasons are pretextual." (Petition 4) Petitioner avers that these issues are important "for the proper enforcement of employment discrimination laws. . . ." (*id.*) and thus require the Supreme

Court to harmonize divergent circuit court standards and to issue guidance to the district courts. Respondent respectfully disagrees.

III.

THE MAINSTREAM VIEW AMONG THE CIRCUITS

Ercegovich v. Goodyear Tire & Rubber Company, 154 F.3d 344 (6th Cir. 1998) well illustrates the mainstream view among the circuits of the appropriate place in the *prima facie* case for considering an alleged discriminatee's showing of comparability. There, the Sixth Circuit stated in relevant part that

> [w]here the employer eliminates an employee's position pursuant to a reduction in force or a reorganization, the employee establishes a prima facie case of . . . discrimination when he or she shows [the first three prongs of the *McDonnell Douglas v. Green* analytical framework] and (4) additional direct, circumstantial, or statistical evidence tending to show that the employer singled out plaintiff for discharge for impermissible reasons. A plaintiff satisfies the fourth prong where he or she demonstrates that a comparable non-protected person was treated better.

Id. at 350 (Internal citations and quotation marks omitted).

IV.

PETITIONER'S ASSERTION THAT THERE IS A SERIOUS CONFLICT AMONG THE CIRCUITS FINDS NO SUPPORT IN PETITIONER'S CITED CASES

Contrary to Petitioner's assertion, *Lynn v. Deaconess Medical Center*, 160 F.3d 484 (6th Cir. 1998), does not depart from the prevailing view among the circuits. There, unlike this case, the employer conceded that plaintiff had established a *prima facie* case of discrimination (*id.* at 487), but argued that plaintiff had failed to produce sufficient evidence to meet his burden of establishing pretext. As the *prima facie* case was conceded, relieving plaintiff of his burden to adduce evidence of disparate treatment to show that his discharge was likely motivated by animus, plaintiff offered evidence of his disparate treatment not to make his *prima facie* case, but at the next evidentiary level, to meet his burden of establishing pretext.

Petitioner reads *Ortiz v. Norton,* 254 F.3d 889 (10th Cir. 2001) out of context serious to illustrate a "fissure" among the circuit courts where none exists. There, the circuit court's criticism of the trial judge's requirement that plaintiff establish his comparability with other employees at the *prima facie* case stage was based not on its belief in any inherent inequity of that approach, but rather upon the judge's erring definition of the term "similarly situated," which in the circumstances of that case incorrectly elevated plaintiff's *prima facie* evidentiary burden to an "onerous" level and thus acted to "cut off the plaintiff's opportunity to show that the proffered reasons for the adverse dismissal were pretext. . . ." *Id.* at 894

Petitioner's treatment of *Conward v. The Cambridge School Committee*, 171 F.3d 12 (1st Cir. 1999), likewise fails to illustrate any glaring split among the circuit courts. True enough, the First Circuit agreed with plaintiff's premise that "the district court's sequencing determination was in error. . . ;" (*id.* At 19) its *decision,* however, affirmed the summary dismissal of plaintiff's case, noting that the court "need not dwell on this [sequencing] error," because the

> fatal weakness of appellant's position is that his evidence, *at whatever stage it is addressed*, does not raise a genuine issue of material fact as to the authenticity of the defendants' professed reason for dismissing him, nor does it raise such an issue concerning the allegation that racial animus underlay the action.

Id. at 20 (Emphasis supplied)

V.

THIS CASE RAISES NO ISSUE IMPORTANT TO THE PROPER ENFORCEMENT OF EMPLOYMENT DISCRIMINATION LAWS REQUIRING THIS COURT TO HARMONIZE DIVERGENT CIRCUIT COURT STANDARDS OR TO ISSUE GUIDANCE TO THE DISTRICT COURTS

There simply is no warrant for Petitioner's prediction of dire consequences for the enforcement of our Nation's employment discrimination laws if the Writ is not granted in this case. There is no significant conflict among the circuit courts and the reasoning in one decision that even *might* be considered to conflict (at least in *dictum)* with the dozens

upon dozens of cases consonant with this case, *Conward v. The Cambridge School Committee, supra*, appears not to have been followed or adopted by any court outside of the First Circuit.

Moreover, Respondent respectfully submits that even if, *arguendo,* this Honorable Court had any inclination to grant the Writ to fix a situation that is not broken, it is far too early in the day not to permit the development of evidentiary sequencing not to evolve on a case-by-case basis.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully submitted,

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